RAZMAN ABDULLAH v. AZIM TAN SRI DATUK ABDUL AZIZ

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: 22NCVC-296-06-2014]
8 DECEMBER 2014

CONTRACT: *Specific performance – Claim for – Sale and purchase of property – Whether parties executed formal agreement – Defendant filed application for leave to sell property – Whether amounted to concluded contract – Whether consent of all beneficiaries of estate prerequisite for order to be made under s. 60(4) Probate and Administration Act 1959 – Whether court has power to order specific performance – Specific Relief Act 1950, s. 11(2)*

The plaintiff brought this action against the defendant for the specific performance of an agreement to sell estate property ('the property') to him. The defendant had been appointed as the administrator of the estate of his late father Tan Sri Abdul Aziz. The defendant's older brother, the late Azmi ('the deceased') was one of the beneficiaries to the estate. Sometime in March 2008, the deceased agreed to sell the property to the plaintiff for the sum of RM900,000. Thereupon, the plaintiff made numerous payments to the deceased towards the deposit for the agreement. When the defendant found out about the agreement between the deceased and the plaintiff, he agreed to proceed with it. Pursuant thereto, by originating summons, the defendant filed an application in court for leave to sell the property to the plaintiff. The application, however, was withdrawn when the court refused to grant the order when it was brought to its attention that one Sukhdev Singh and one Paramjit Kaur had lodged a caveat on the property claiming that the deceased had sold the property to them. The plaintiff was advised by the defendant to wait until the said matter was resolved. In March 2012, the plaintiff was informed that the defendant sought an increase of the purchase price to RM1.1 million. The plaintiff agreed to pay the said sum. However, upon the demise of the deceased in May 2012, the defendant informed the plaintiff that the beneficiaries to the estate wished to suspend indefinitely the sale and purchase agreement and offered to refund the monies paid to the deceased. The plaintiff did not agree and commenced the present action for specific performance. The issues that arose for determination were (i) whether there was a concluded contract of sale between the plaintiff and the defendant; and (ii) if the answer was in the affirmative, whether the plaintiff was entitled to specific performance. The defendant submitted that no formal agreement was executed by the parties, thus in the absence of a written agreement, the plaintiff's claim for specific performance was misconceived. The plaintiff, however, contended that there was an oral agreement made with the defendant for the sale of the property to him which the parties had acted upon.

Held (allowing plaintiff's claim for specific performance):

(1) A perusal of the correspondence between the parties clearly showed that the position adopted by the defendant was without merit. It was indisputable that there was copious documentary evidence in this case. If indeed, as alleged by the defendant there was no concluded contract, it was difficult to fathom why he had filed in court the application for leave to sell the property to the plaintiff. The defendant's conduct in making the said application amounted to an admission that there was a concluded contract between them. It is settled law that there is no requirement under the Contracts Act 1950 that an agreement must be in writing in order to be enforceable. An oral agreement is a valid and enforceable agreement. (paras 23, 24 & 28)

(2) It is plain from s. 60(4) of the Probate and Administration Act 1959 that an administrator needs the permission of the court to sell estate property. There is no mention in the section that the consent of all the beneficiaries is a prerequisite for an order under this section to be made. The court has the power to order specific performance of an agreement notwithstanding the fact that the sale of the property had not received the sanction of the court under the said s. 60(4). Further, there was no evidence to rebut the presumption in s. 11(2) of the Specific Relief Act 1950 that damages would not be an adequate remedy. In the circumstance, the plaintiff became entitled to specific performance. (paras 35, 38, 43 & 44)

Case(s) referred to:

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***

Lau Sieng Nguong v. Hap Shing Company Ltd [1969] 1 LNS 80 FC ***(refd)***

Lau Yoke Hee & Anor v. Ting Liang Teng & Anor [2005] 3 CLJ 770 CA ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Loo Choo Teng & Anor v Cheok Swee Lee & Ors [2000] 2 CLJ 389 CA ***(refd)***

Ong Thye Peng v. Loo Choo Teng & Ors [2008] 1 CLJ 571 FC ***(refd)***

Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154 SC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Zaibun Sa Syed Ahmad v. Loh Koon Moy & Anor [1982] CLJ 457; [1982] CLJ (Rep) 58 PC ***(refd)***

Legislation referred to:

Probate and Administration Act 1959, s. 60(4)

Specific Relief Act 1950, ss. 11(1)(c), (2), 19, 21(1)

For the plaintiff - Wan Haron Wan Hassan (Tengku Najiha Tengku Zahari with him); M/s Wan Haron & Assocs

For the defendant - Mohd Faizal Hassan; M/s Anuar Hong & Ong

Reported by Suhainah Wahiduddin

JUDGMENT

SM Komathy Suppiah JC:

[1] The plaintiff, Razman bin Abdullah has brought this action against the defendant, Azim bin Tan Sri Datuk Abdul Aziz for the specific performance of an agreement to sell estate property ("the property") to him. The defendant in his defence denied there was a concluded contract between them. Further or in the alternative, the plaintiff is precluded from seeking specific performance as the beneficiaries object to the sale.

The Facts

[2] The late Tan Sri Abdul Aziz bin Zakaria ("Tan Sri Abdul Aziz") was during his lifetime the registered proprietor of the property held under No. Hakmilik 6696, Lot No. 76, Section 11, Bandar Petaling Jaya Daerah Petaling bearing postal address No. 3, Jalan 11/19, 42000 Petaling Jaya. He passed away on 24 June 1993.

[3] The defendant was appointed as the administrator of the estate of his late father Tan Sri Abdul Aziz sometime in 1995. The late Azmi bin Tan Sri Abdul Aziz ("the deceased") was the defendant's elder brother and one of the beneficiaries to the estate of Tan Sri Abdul Aziz. In March 2008, the deceased agreed to sell the property to the plaintiff for the sum of RM900,000. Thereupon, the plaintiff made numerous payments to the deceased towards deposit for the agreement. A total of RM145,200 was paid over a period of four years from 13 March 2008 to 8 February 2012.

[4] When the defendant found out about the agreement between the deceased and the plaintiff, he agreed to proceed with it. In March 2009, he proposed that the purchase price be revised to RM1 million. The plaintiff expressed his willingness to proceed with the transaction at RM1 million.

[5] Pursuant thereto, by originating Summons No. S24-143-2009, the defendant filed an application in court for leave to sell the property to the plaintiff. The application, however, was withdrawn when the court refused to grant the order when it was brought to its attention that one Mr Sukhdev Singh and one Madam Paramjit Kaur had lodged a caveat on the property claiming that the deceased had sold the property to them.

[6] The plaintiff was advised by the defendant to wait until the claim made by Mr Sukhdev Singh and one Madam Paramjit Kaur was resolved.

[7] In March 2012, the defendant's solicitors informed the plaintiff that the defendant sought an increase of the purchase price to RM1.1 million. The plaintiff agreed to pay the said sum.

[8] However, upon the demise of the deceased in May 2012, the defendant informed the plaintiff that the beneficiaries to the estate of Tan Sri Abdul Aziz wished to suspend indefinitely the sale and purchase agreement and offered to refund the monies paid to the deceased. The plaintiff did not agree. Whereupon in June 2014, the plaintiff commenced the present action for specific performance, and in the alternative damages for breach of contract.

Correspondence Between Parties

[9] It will be helpful if I set out the letters that were exchanged between the parties at the material time in relation to the sale of the property to the plaintiff. The first is a letter dated 10 November 2009 that was sent by the defendant's solicitors, Messrs R Noor & Co to Messrs Azlan Shah Sukhdev & Co who were representing Mr Sukhdev Singh and Madam Paramjit Kaur that the defendant had no knowledge of the transaction. The relevant portions read:

> 1. That all material times, we act or Encik Azim bin Tan Sri Abdul Aziz, the administrator of the estates of the late Tan Sri Abdul Aziz bin Zakaria and the late Puan Sri Pon binti Abdullah;
>
> 2. That our client denies having any knowledge of any alleged "interest" of Mr Sukhdev Singh and Madam Paramjit Kaur until last year when the existence of a caveat was revealed by Messrs Lim & Yeoh, solicitors for an interested purchaser, Encik Razman bin Abdullah;
>
> 3. The above property is and has always, legally and beneficially been estate property, a fact that was communicated to Mr Sukhdev sometime in 2007 when he called our Cik Rusnita Noor to make enquiries of the status of the same. Furthermore any title search will also reveal this said fact;
>
> 4. Our client has no knowledge of any "arrangement" that your client may have made with Encik Azmi bin Tan Sri Abdul Aziz, a beneficiary of the estate;
>
> 5. As our client has never accepted any payment from your client, be it in the form of an earnest deposit or otherwise, our client does not recognise your clients' alleged "interest" in the said property;
>
> 6. That we have filed in an application at the Kuala Lumpur High Court for an order to sell the said property to Encik Razman (or his nominee) and the court has ordered us to remove the caveat and to exhibit the duly executed sale & purchase agreement before any such order will be granted. As such we will not be withdrawing our application to remove the caveat.

[10] On 15 April 2010, Messrs R Noor & Co sent a letter to the plaintiff's solicitors to explain the reasons as to why the defendant had withdrawn the application made to court for leave to sell the property to the plaintiff. It stated:

> Kindly be informed that we have on the 8 April 2010 at the request of the court withdrawn our application to sell the above property to your client. This was due to the fact that the court wanted the caveats placed by the third party to be removed before granting the order for sale. For your information, we did apply to remove the first caveat but the third party has unfortunately in December 2009 placed yet another caveat on the above property.
>
> In view of the fact that we are unable to advise the court on when the issue of caveats can be resolved, we were asked to withdraw the application which has been long outstanding and re-file as and when the caveats had been removed.

As this property is now the subject matter of a civil suit which we are will be dealt with expeditiously as no money ever changed hands between our client (the administrator who is the registered owner) and the third party, we feel that it will be more prudent to dispose of the civil suit first before filing another application for the order for Sale. We have also applied for an injunction against the third party to prevent him from continuing to place wrongful further caveats on the above property.

[11] On 3 February 2012, Messrs Anuar Hong & Ong issued a letter to the plaintiff enclosing the draft sale and purchase agreement. It stated:

We enclosed herewith the draft sale & purchase agreement for your perusal and early comments.

We have served the same draft to the vendor on today, and we are now awaiting his approval.

Your early reply is highly appreciated.

[12] On 7 March 2012, the defendant's new solicitors Messrs Anuar Hong & Ong, wrote to the plaintiff stating as follows:

Re: Draft Sale & Purchase Agreement

Property : 11/9 House – No. Hakmilik 6696, Lot No. 76, Section 11, Bandar Petaling Jaya Daerah Petaling, situated at No. 3, Jalan 11/19, 42000 Petaling Jaya

Vendor : Tuan Hj Azim bin Tan Sri Abdul Aziz

Purchaser(s) : Razman bin Abdullah & Sharida binti Sathar

...

We also refer to our letter dated 3 February 2012. Please be informed that we have the vendor's instructions to execute the said sale & purchase agreement. As such kindly let us have your reply for the confirmation in respect of the draft submitted to you.

Meanwhile, we are also instructed by the vendor whether you are agreeable to re-issue for the sum of RM110,000 being the 10% deposit of the purchase price, which the vendor is now proposing a settlement to reimburse to you the sum paid upon receiving the balance of purchase price.

[13] About two months later, on 16 May 2012, Messrs Anuar Hong & Ong wrote another letter to the plaintiff. The material portions of the letter stated:

Re: Sale and Purchase Agreement

Intended Purchaser : Razman bin Abdullah

Vendor : Azim bin Abd Aziz (the Administrator)

Property : Held under No. Hakmilik 6696, Lot No. 76, Section 11/19, Petaling Jaya

A We refer to the above matter,

Due to the recent unforeseen circumstances that have fallen, the vendor's family has instructed our office that they would like to suspend indefinitely the sale and purchase agreement of the said property.

B The vendor has informed that they are willing to return the said deposit to you. The vendor's family sincerely hope for your kind understanding and wish to thank you in advance.

[14] By a letter dated 22 May 2012, the plaintiff responded as follows:

Firstly, allow me to convey my sincere and deepest sympathy to En Azmi C Abdul Aziz' as family as well as to all his siblings and unfortunate incident that happened recently.

As for the sale of the above s. 11 property and as discussed with your En Mohd Faizal bin Hassan on 21 May 2012, we wish to inform that we would like to proceed with the sale. As you are aware, we have been at this since year 2008 and I've personally assisted En Azmi Abdul Aziz D many a times. It was with good faith that we had negotiated and agreed to wait for all the legal matters and disputes to be resolved first and to proceed with the sale.

Issues For Determination

E **[15]** There are essentially two issues for determination in this case:

(i) Whether there is a concluded contract of sale between plaintiff and defendant; and

(ii) If the answer is in the affirmative, whether the plaintiff is entitled to specific performance.

F

Witnesses

[16] Both the plaintiff and the defendant gave evidence in support of their respective cases. No other witnesses were called. The evidence of the plaintiff and defendant was in sharp conflict.

G

[17] The plaintiff in his evidence maintained that there was a valid and binding agreement between them. He said that the defendant had appointed solicitors and formally expressed his intention to proceed with the agreement that he had originally made with the deceased.

H **[18]** On the other hand, the defendant denied in his evidence that there was a concluded agreement. He accepted that he had agreed to proceed with the agreement but explained that the beneficiaries are now not keen to proceed with the sale. When asked to explain why the beneficiaries have decided not to proceed with the sale and purchase agreement, he explained:

I Because unfortunately, the deceased during that time was very ill and was not in good condition and all the beneficiaries felt not good to proceed with the sale of the said property.

Issue 1: Whether There Is A Concluded Agreement?

[19] On the issue of whether there is a concluded agreement for the sale of the property to the plaintiff, it is the defendant's case that as no formal agreement was executed by the parties, this indicated that there is no concluded contract between them. Only a draft agreement was prepared which was never executed by the parties. In the absence of a written agreement, the plaintiff's claim for specific performance was misconceived. In response, the plaintiff accepted that no formal agreement was signed between them but contended that there was an oral agreement made with the defendant for the sale of the property to him which the parties had acted upon.

[20] The court is faced with two conflicting versions of the facts.

[21] In *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97, the Court of Appeal held that a trial judge when deciding whether to accept or reject the evidence of a witness, is required to test it against relevant criteria. He must take into account the presence or absence of any motive that a witness may have in giving his evidence. Where contemporary documents exists, he must test the oral evidence of a witness against this. He must also test the evidence of a particular witness against the probabilities of the case.

[22] In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, the trial judge disregarded the contemporaneous documentary evidence in that case and accepted the oral testimonies of the defendant's witnesses and found the plaintiff guilty of fraudulent misrepresentation. On appeal, the Federal Court reversed the finding of fraud on the basis that the trial judge had overlooked that the oral evidence clashed with the contemporaneous documentary evidence. It was explained at p. 234:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[23] Applying these principles to the facts of the present case, it is undisputable that there is copious documentary evidence in this case. A perusal of the correspondence between the parties shows clearly that the position adopted by the defendant is without merit. If indeed, as alleged by the defendant there is no concluded contract, it is difficult to fathom why he

had filed in court the application for leave to sell the property to the plaintiff. In my judgment, the defendant's conduct in making the said application amounts to an admission that there was a concluded contract between them.

[24] Whilst it is true that there is no formal written agreement executed, it is settled law there is no requirement under the Contracts Act 1950 that an agreement must be in writing in order to be enforceable. An oral agreement is a valid and enforceable agreement.

[25] In *Lau Sieng Nguong v. Hap Shing Company Ltd* [1969] 1 LNS 80; [1969] 1 LNS 80, the court held that:

> It was clear law that where a contract was to be deduced from a set of documents it was necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement.

[26] The Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 observed that:

> Federal Court examined the correspondence between parties and conclude even though the parties had not signed a formal sales and purchase agreement, an enforceable contract had come into existence as that was the result intended by parties.

[27] In *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498, the Court of Appeal held:

> On the facts, there was a concluded contract despite the want of a duly executed formal agreement. There was an offer by the defendant and acceptance by the plaintiff, and there was consideration, certainty of parties, certainty of price and certainty of property. Also, there were the unequivocal acts of part performance by the plaintiff which were referable to an existing contract between the parties. The acts of part performance in the present case were the payment of the deposit coupled with the RM5,000 meant for the squatters.
>
> Although it was true that no formal contract of sale and purchase was ever executed, that did not matter since there could be a concluded contract even where the parties contemplated the execution of a more formal document. The defendant's argument that this was a case where the execution of the formal written agreement was a condition precedent to there being a contract was unacceptable. The defendant's own evidence that the defendant would readily accept the balance of the purchase price even without a formal agreement being an unimportant document to the contracting parties. So objectively speaking, the parties had already made a contract and the written agreement was a mere formality ...

[28] By reason of the authorities cited, there is no merit in the complaint made by the defendant. In the result, I find on the evidence that there was a concluded agreement between the plaintiff and the defendant.

Issue 2: Whether Plaintiff Entitled To Specific Performance?

[29] That brings me to the second issue. It has to do with whether the plaintiff is entitled to specific performance of the contract when the beneficiaries of the estate of Tan Sri Abdul Aziz object.

[30] Specific performance is an equitable remedy for the enforcement of contracts. Section 21(1) of the SRA provides (illustrations omitted) that the court has a discretion to grant specific performance. It provides:

> (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
>
> (2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:
>
> (a) Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part; and
>
> (b) Where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.
>
> (3) A case in which the court may properly exercise a discretion to decree specific performance is where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

[31] Before I deal with the defendant's complaint that specific performance cannot be decreed without the consent of the beneficiaries, I will briefly deal with the principles applicable in relation to a claim for specific performance of a contract for the sale of immovable property. Section 11 of the Specific Relief Act 1950 provides:

> (1) Except as otherwise provided in this chapter, the specific performance of any contract may, in the discretion of the court, be enforced ...
>
> (2) Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

[32] The leading authority on section 11(2) of the Specific Relief Act is the Privy Council decision of *Zaibun Sa Syed Ahmad v. Loh Koon Moy & Anor* [1982] CLJ 457; [1982] CLJ (Rep) 58; [1982] 2 MLJ 92. In that case, the purchaser applied for specific performance of a sale and purchase agreement to sell a piece of land to him. There was an oral agreement between the parties that the vendor would pay RM5,000 to the purchaser if the vendor breached the agreement. The trial judge ruled that the existence of the oral

agreement demonstrated that money was an adequate relief, thus rebutting the presumption contained in s. 11(2). Consequently, he awarded damages to the purchaser. The purchaser appealed to the Federal Court which allowed the appeal and granted an order for specific performance. The vendor then appealed to the Privy Council.

[33] The Privy Council after referring to ss. 11(1)(c), 11(2) and 19 of the Specific Relief Act held that the oral agreement for the payment of the liquidated damages did not prevent the granting of specific performance in view of s. 19.

[34] In *Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154; [1989] 2 MLJ 155, Lee Hun Hoe CJ (Borneo) stated:

> It was further shown that s. 20(1)(a) is of general application while s. 11(2) deals specifically with contract for the sale of land. It is therefore right that s. 11(2) will prevail in cases involving contracts dealing with sale and purchase of property.

[35] In the instant case, there is no evidence to rebut the presumption in s. 11(2) of the Specific Relief Act that damages would not be an adequate remedy. In the circumstance, the plaintiff becomes entitled to specific performance.

[36] I now turn to consider the defendant contention that as the beneficiaries oppose the sale, no specific performance can be ordered in favour of the plaintiff. The question arises, is this proposition valid?

[37] Section 60 of Probate and Administration Act 1959 provides:

> (1) In dealing with the property of the deceased his personal representative shall comply with this section.
>
> (2) Unless the court otherwise directs, no sale, transfer, conveyance or assent in respect of immovable property shall be made without the concurrence of all the personal representatives of the deceased; and subject as aforesaid, where there are several personal representatives the powers of all may, in the absence of any direction to the contrary in the will or grant of administration, be exercised by any one of them.
>
> (3) A personal representative may charge, mortgage or otherwise dispose of all or any property vested in him, as he may think proper, subject to any restriction which may be imposed in this behalf by the will of the deceased, and subject to this section:
>
> Provided that an executor may dispose of any property notwithstanding any restriction so imposed, if he does so in accordance with an order of the court.
>
> (4) An administrator may not, without the previous permission of the court:
>
> (a) Mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being vested in him; or

(b) Lease any such property for a term exceeding five years.

(5) Nothing in this section shall affect sub-ss. 15(2) of the Trustee Act 1949 (Act 208).

(6) The disposal of property by a personal representative in contravention of this section shall be voidable at the instance of any other person interested in the property.

[38] It is plain from s. 60(4) of the Probate and Administration Act that an administrator needs the permission of the court to sell estate property. It is important to note that there is no mention in the section that the consent of all the beneficiaries is a prerequisite for an order under this section to be made. There are a number of authorities on this point but I only need to refer to three of them.

[39] The first one is *Ong Thye Peng v. Loo Choo Teng & Ors* [2008] 1 CLJ 571, the Federal Court held that:

> Thus on the facts of this case, it could not be argued that the beneficiaries would not be allowed to withdraw their earlier consent to sell the property in favour of a higher price. It would conflict with the duty of the court to protect the interest of the beneficiaries. The burden was on the applicant to lead evidence on the current value of the property. In the absence of such evidence, the court would be entitled to assume that the agreed price was the best obtainable.

[40] The next authority is *Loo Choo Teng & Anor v. Cheok Swee Lee & Ors* [2000] 2 CLJ 389; [2000] 2 MLJ 257, the Court of Appeal addressed the question of whether the court is empowered to decree specific performance in favour of a purchaser in a case where the administrator has not obtained the permission of the court to sell the estate property to the purchaser. In that case, the plaintiff entered into an agreement with the trustees of the deceased estate to purchase a piece of land. Clause 5 of the agreement stated that the agreement shall be null and void if the State Government refused to release the property from compulsory acquisition and cl. 8 stated that the trustees shall also apply to court for a formal sanction to sell the property. Following the execution of the sale and purchase agreement, there was an exchange of correspondence between the parties on whether the subject property had been released from acquisition by the State Government. The defendants took the position that no such release had taken place and the sale and purchase agreement was at an end. The plaintiff contended otherwise and instituted proceedings for specific performance of the agreement. The judge ordered specific performance and the defendants appealed.

[41] I think it will be helpful to quote *in extenso* a passage from the judgment of Gopal Sri Ram JCA who laid down in the clearest possible terms the principles applicable in such a case. He said (at p. 263):

A Is leave of court necessary?

The subject property belongs to the estate of a deceased. It therefore comes as no surprise that the vendors and the plaintiffs expressly required an application to court for leave to sell it. So, when one comes to deal with the question whether specific performance ought to be decreed, one
B is met by the question: specific performance of what? And the answer must surely be: of the vendors' obligations under the sale and purchase agreement. Among these obligations is that housed in cl. 8 which requires the vendors to formally obtain the court's sanction for the sale of the subject property to the plaintiffs. However, no such application as provided by cl. 8 was ever made by the vendors. It follows that the court
C giving its formal sanction for the sale is one of the conditions predicated by the sale and purchase agreement.

...

It is trite that all forms of specific relief are in the discretion of the court. It is equally trite that the discretion conferred is not a fanciful one. It is
D a discretion that must be exercised in accordance with sound principles. In the case of the remedy of specific performance this is made amply clear by s. 21(1) of the Specific Relief Act 1950 which provides:

> The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it
E is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

...

However, having regard to the special circumstances of this case it would,
F in my judgment, be unjust to the plaintiffs to deny them specific relief altogether. It must not be forgotten that there is here a contract for the sale of immovable property. It is the kind of obligation that statute rebuttably presumes to be incapable of being remedied by an award of monetary compensation (see s. 11(2) of the Specific Relief Act 1950). Moreover, this appears to be a case where the vendors, having entered
G into a perfectly valid transaction went about inventing all sorts of excuses to get out of it. Having failed in their efforts, it would be quite wrong to permit them to succeed, as it were, on the strength of a mere side-wind.

This is therefore an appropriate case to decree specific performance, not as ordered by the learned judge, but on terms.

H In my view, a Court of Equity is sufficiently empowered to decree specific performance on terms. There are cases where an order decreeing specific performance has made provision for ancillary matters, such as the payment of purchase money with interest (see eg, Cooper v. Morgan [1909] 1 Ch 261). In such cases, the payment of the purchase price is a
I term upon which relief is granted. If there is non-compliance, the vendor must surely be at liberty to apply to have the decree vacated.

There is also precedent for decreeing specific performance and then leaving it to the defendant to later apply to have the decree vacated on the ground of impossibility of performance. ...

> ... I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl. 8 of the sale and purchase agreement. Such application shall be made not later than seven days from the date of this judgment. In the event the vendors make default, the plaintiffs shall be at liberty to seek approval from the court for the sale of the subject property to them. Should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance.

[42] The third case is *Lau Yoke Hee & Anor v. Ting Liang Teng & Anor* [2005] 3 CLJ 770, the Court of Appeal stated that:

> The third ground advanced before us is that the decree of specific performance is bad in law because the consent of the beneficiaries of the deceased's estate was not obtained before it was made. Learned counsel for the appellants relies on s. 60(2) of the Probate and Administration Act 1959 which reads as follows:
>
> ...
>
> With respect, we are unable to agree with learned counsel's interpretation of this section. It is not, and it has never been the law that the sale of the property belonging to the deceased cannot be transacted without the consent of the beneficiaries of that estate.

[43] The abovequoted passages conclude the issue in the plaintiff's favour. The court does have the power to order specific performance of an agreement notwithstanding the fact that the sale of the property has not received the sanction of the court under s. 60(4) of the Probate and Administration Act.

Conclusion

[44] For the reasons stated, I allow the plaintiff's claim for specific performance on terms that the defendant apply to court for permission to sell the property to him. Such application shall be made not later than four weeks from the date of this judgment. I further order that in the event, the defendant makes default, the plaintiff shall be at liberty to seek approval from the court for the sale of the property to him. In the event, sanction is refused by the court, it would be open to the defendant to move for the decree specific performance to be vacated on the ground of impossibility of performance.

[45] Additionally, the parties are at liberty to apply to court for such orders or directions as may be necessary to give effect to the decree hereby granted.

[46] The defendant shall pay the plaintiff costs of RM10,000.